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FILE COPY

IN THE

Supreme Court of the United States

October Term, 1940.

No. 17.

ROBERT J. DECKERT, ROWLAND W. RANDAL, DAVID W. COMPTON, et al.,
Petitioners,

v.

INDEPENDENCE SHARES CORPORATION, ALFRED H. GEARY, FRANK McCOWN, JR., et al.

BRIEF
OF
Independence Shares Corporation, Alfred H. Geary, Frank McCown, Jr., et al., Respondents.

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BRIEF OF INDEPENDENCE SHARES CORPORATION, ALFRED H. GEARY, FRANK McCOWN, JR., ET AL., RESPONDENTS.

QUESTIONS INVOLVED.

Where the amount in controversy is less than $3,000., does the District Court have jurisdiction under Section 24 (1) (a) of the Judicial Code?

Negatived by the Court below.

Where there is an adequate remedy at law, does the District Court, under Section 24 (1) (a) and Section 24 (8) of the Judicial Code and under the Securities Act of 1933, have jurisdiction to grant equitable relief?

Not passed upon by the Court below.

Does the Securities Act of 1933 give purchasers claiming under Section 12 (2) the right to the appointment of a receiver?

Negatived by the Court below.

Does the Securities Act of 1933 give purchasers claiming under Section 12 (2) the right to bring a class action?

Negatived by the Court below.

Do potential simple contract creditors who have not reduced their claims to judgment have the right to sue for the appointment of a receiver?

Negatived by the Court below.

Is a contingent liability to be considered a liability for the purpose of determining solvency?

Not passed upon by the Court below.

Where the District Court has no jurisdiction to appoint a receiver, is the granting of an injunction in aid of such a request proper?

Negatived by the Court below.

FACTS AND HISTORY OF THE CASE.

This is a bill in equity brought by nine complainants, holders of Capital Savings Plan Contract Certificates issued by Capital Savings Plan, Inc. (R. 4-6), seeking the appointment of a receiver for Independence Shares Corporation, a Pennsylvania corporation, successor to Capital Savings Plan, Inc., (R. 27), and attempting to reach property held by the Pennsylvania Company in trust for planholders (R. 27).

The complainants are nine of approximately eighteen thousand planholders (R. 200). The total amount which these nine complainants have paid in on their plans, less their cash withdrawals, is less than three thousand dollars, contrasted with approximately five million dollars paid by the other eighteen thousand planholders (R. 12, 274-276). The following is a tabular statement of the accounts of the complainants showing the amounts paid, the withdrawals and the dates of purchase (R. 274-276).

Date of Purchase	Purchaser	Paid in	Withdrawn	Amt. Pd. in Less Withdrawals
Apr. 4, 1938	Robert J. Deckert	$ 80.00		$ 80.00
Dec. 6, 1937	Rowland W. Randal	480.00		820.00
Sept. 3, 1937	Rowland W. Randal	340.00		
Oct. 9, 1934	David W. Compton	250.00	105.00	145.00
June 22, 1936	R. G. Cadman	300.00		300.00
July 27, 1937	James L. Gleason	180.00		180.00
July 24, 1934	Samuel Miller	440.00		440.00
July 8, 1935	Irene R. Randal	460.00		460.00
July 30, 1936	Joseph Laky	300.00		300.00
Sept. 5, 1934	Abe Zubrow	500.00	300.00	200.00
	Totals	$3,300.00	$405.00	$2,925.00

Capital Savings Plan, Inc., was incorporated under the laws of Pennsylvaina on October 15, 1931. On December 31, 1938, Capital Savings Plan, Inc., merged with Independence Shares Corporation. At that time Independence Shares Corporation was a wholly owned subsidiary of Capital Savings Plan, Inc. and is the surviving corporation (R. 104, 105).

Capital Savings Plan, Inc., was created for the purpose of sponsoring and distributing to the public contract certificates which provide for the purchase of Independence Trust Shares either by monthly payments or by a single payment (119, 120).

Capital Savings Plan, Inc., entered into contracts with the complainants whereby the complainants became holders of Capital Savings Plan Contract Certificates. Under the terms of these contract certificates, Capital Savings Plan, Inc., contracted that the Pennsylvania Company would act as Trustee for the holder of Capital Savings Plan Contract Certificates, and, as such Trustee, the Pennsylvania Company would receive payments made by the contract certificate holder, and after authorized deductions, purchase trust shares which would be held in trust by the Pennsylvania Company for the Capital Savings Plan Contract Certificate holder individually (Original Exhibit No. 5, offered at R. 270; Original Exhibit No. 1, now lodged with this Court, printed Pa. Co. Appendix pp. 31, 39).

Capital Savings Plan, Inc., entered into a contract with the Pennsylvania Company whereby the Pennsylvania Company contracted to act as Trustee for holders of Capital Savings Plan Contract Certificates; to receive payments made by such contract certificate holders and after making authorized deductions, invest the balance in Independence Trust Shares and to hold the trust shares as individual trust property for each contract certificate holder, subject only to his order (Original Exhibit No. 1 now lodged with this Court, printed Pa. Co. Appendix pp. 4, 5, 6).

Independence Shares Corporation creates Independence Trust Shares by the deposit with the Pennsylvania

Company as Trustee of one share of stock of each of a specified list of corporations for which 1000 Independence Trust Shares are issued. The number of corporations was fifty and is now thirty-five (R. 10, 91, 92).

On June 23, 1938, the Securities and Exchange Commission instituted an equity suit in the United States District Court for the Eastern District of Pennsylvania against Capital Savings Plan, Inc., and Independence Shares Corporation alleging violation of the Securities Act of 1933. On the same day Capital Savings Plan, Inc., and Independence Shares Corporation filed an answer denying the violations, but admitting the jurisdiction of the Court, and that the bill stated a cause of action and consenting to the entry of a final decree. On the same day the Court entered a decree restraining future violations of the Securities Act (R. 22).

On July 12, 1938, the Securities and Exchange Commission allowed a registration statement of Independence Shares Corporation covering both Independence Trust Shares to be sold and those already issued to become effective as of June 14, 1938; and a registration statement of Independence Trust Shares Purchase Plans to be sold by Capital Savings Plan, Inc., to become effective as of June 8, 1938 (Original Exhibit No. 15, now lodged with this Court, p. 27) (R. 61).

The prospectuses issued under the registration statements of June 8, 1938, and June 14, 1938, contain a "contingent liability" footnote to the balance sheet of Independence Shares Corporation. This footnote states that there may be a contingent liability on the part of Independence Shares Corporation for violations of Section 12 (1) of the Securities Act (Original Exhibit No. 15 now lodged with this Court, pp. 24, 39).

The complainants have filed a bill of complaint against Independence Shares Corporation as successor to Capital Savings Plan, Inc., praying for the appointment of a receiver (R. 27). The complainants base their prayer for the

appointment of a receiver of Independence Shares Corporation on alleged misrepresentations made to them by Capital Savings Plan, Inc., in the sale of Capital Savings Plan Contract Certificates (R. 13), and on an alleged insolvency of Independence Shares Corporation arising from a contingent liability footnote appearing on its Balance sheet contained in its prospectus of January 3, 1939 (R. 22-24).

The contingent liability footnote that appears in this prospectus is a "bring down" of the original footnote which appeared in the prospectus of Independence Trust Shares dated June 8, 1938, and was placed as a footnote to the balance sheet because of contingent liability arising from a possible violation of Section 12 (1) of the Securities Act which relates to the sale of securities without an effective registration statement (Original Exhibit No. 15 now lodged with this Court, pp. 24, 39-40).

On March 23, 1939, motions to dismiss the action were filed by Independence Shares Corporation, the individual defendants named and the Pennsylvania Company (R. 81). Testimony was offered on behalf of the complainants in support of their bill (R. 82, 309). None of the complainants appeared or testified (R. II, III, IV), and no testimony was offered showing any fraud or misrepresentations in the sale of securities to them (R. 82-309).

On May 18, 1939, the Court, per Kalodner, J., denied the Motions of the defendants to dismiss the Complaint, and referred the matter to John M. Hill, Esq., as Special Master, to hear and determine the evidence and to decide questions of law or fact on the solvency or insolvency of Independence Shares Corporation (R. 363).

The balance sheet of Independence Shares Corporation as of February 28, 1939, shows that the assets exceed the liabilities by $63,074.90 (R. 333-336). The allegation of insolvency is predicated solely on contingent liability for a possible violation of Section 12 (1) of the Securties Act of 1933 (R. 22-24).

On May 20, 1939, Motion by Complainants for Preliminary Injunction was filed (R. 31).

On May 25, 1939, Orders by Complainants to Amend the Caption by adding J. H. Irvin and J. H. Van Sciver as parties plaintiff, and the Order of Court approving the same, were filed (R. 366).

On May 27, 1939, the Answer of Independence Shares Corporation and the individual defendants was filed (R. 42).

On June 2, 1939, Exceptions by Defendants to the Orders of Court adding parties plaintiff were filed (R. 367).

On June 2, 1939, Orders of Court Granting Preliminary Injunction against the Pennsylvania Company and Independence Shares Corporation from paying and receiving, respectively, the sum of $38,258.85, were filed (R. 368).

On June 5, 1939, Notice of Appeal to the Circuit Court of Appeals by Independence Shares Corporation and individual defendants, was filed (R. 369).

On November 11, 1939, the Circuit Court of Appeals filed its opinion reversing the orders appealed from and holding that the Court below had no jurisdiction to entertain the request for the appointment of a receiver and that the remedy of an alleged defrauded purchaser is a civil action to recover "the consideration paid by him" (R. 384).

On December 20, 1939, the Circuit Court denied the complainants' petition for a rehearing (R. 391), and on February 17, 1940, the complainants filed, and on March 25, 1940, this Court granted, a petition for writ of certiorari to the Circuit Court (R. 393).

ARGUMENT.

I. Summary of Argument.

The District Court had no jurisdiction under Section 24 (1) (a) of the Judicial Code as the amount in controversy, viz: the amount claimed by any one or all of the complainants, was less than $3000.

The amount in controversy is measured by the complainants' claims and not by the amount of the assets sought to be reached. Where the jurisdictional amount is lacking, it cannot be supplied by adding parties.

Any right to sue in equity under Sections 24 (1) (a) and 24 (8) of the Judicial Code and under the Securities Act of 1933, is subject to the provision that: "Suits in equity shall not be sustained in any Court of the United States where a plain, adequate and complete remedy may be had at law." (Section 267 of the Judicial Code.)

Under Section 12 (2) of the Securities Act a purchaser of securities, claiming misrepresentations in the sale to him, may sue in the District Court to recover the consideration paid by him. Where the consideration is money, his right is to a money judgment which would be obtainable at law.

If the complainants can establish any claim under the Securities Act, they would be entitled to a money judgment, and since they have an adequate remedy at law, they cannot invoke the unusual jurisdiction of equity.

Complainants' substantive rights are limited to the rights given by the Act under which they are suing, viz: the Securities Act. The petition of the complainants for the appointment of a receiver is without legal justification since the Act under which they claim this right does not give it to them, the only right given being the right "to recover the consideration paid".

No right to bring a class action is given by the Securities Act. A spurious class suit gives the parties thereto no greater right to the appointment of a receiver than they would have had had they sued separately.

A potential simple contract creditor has no standing to request the appointment of a receiver even if it be assumed that the corporation for whom the receiver is requested is insolvent and that misrepresentations were made by the corporation in the sale of securities to the potential creditor. Before a creditor can ask for the appointment of a receiver, he must first obtain a judgment and demonstrate that it cannot be satisfied.

Independence Shares Corporation is solvent as shown by its balance sheet. Complainants contend that Independence Shares Corporation is insolvent because of a contingent liability. Contingent liability is not a liability for the purpose of determining the question of solvency or insolvency.

June 14, 1939, was the last day suit could be brought to enforce any claim based on contingent liability as it ceased to exist after that date, since the Securities Act provides that causes of action under Section 12 (1) expire absolutely one year from the date of effective registration.

The District Court erred in enjoining the Pennsylvania Company from paying, and Independence Shares Corporation from receiving, $38,258.85. This money was due to Independence Shares Corporation by the Pennsylvania Company. This injunction was improper as it was issued in aid of the appointment of a receiver which the District Court had no authority to make.

II. Introduction.

We recognize that the legal question here involved is one of jurisdiction but before we discuss the legal propositions, we feel constrained to point out to this Court certain fundamental inaccuracies in the complainants' brief which we cannot permit to go unchallenged.

One of these inaccuracies is the use by the complainants of the terms "fraudulent per se" and "all-pervasive fraud" as characterizing the nature of the business trans-

acted by Independence Shares Corporation and its predecessor, Capital Savings Plan, Inc.

The Complaint, under Article IV, "History and Method of Doing Business of Defendant Companies" (R. 9, et seq.), shows that Independence Shares Corporation issued to complainants Capital Savings Plan Contract Certificates, that the contract certificates are monthly payment plans issued and sold in unit denominations of $1200. providing for the payment of $10. a month on a periodical or instalment basis over a period of ten years; and that under the plans, life insurance policies were obtainable at the option of the contract certificate holder which provided, that upon the death of the subscriber, the insurance company would pay to the trustee in one lump sum the instalment payments remaining unpaid, which sum ranges downward on a $1200. unit certificate from $1190. to $10 (R. 9).

The Bill of Complaint describes the operation of the plan as follows (R. 9, 10):

> "25. The Trustee upon receipt of each periodic installment payment deducted and still deducts certain various fees and charges. The said fees and charges included a service fee of $60 on a ten dollar per month unit certificate, deducted from the equivalent of the first nine monthly payments; a Trustee fee of 25¢ per ten dollar payment or fraction thereof, deducted from each monthly payment; and, on installment payment plans with insurance, an insurance fee at a standard or a sub-standard rate, deducted in proportionately decreasing amounts from each monthly payment.
>
> 26. The balance thereof, after the said fees and other charges were deducted, was and is used by the Trustee at the direction of the sponsor to acquire from Independence 'Independence Trust Shares' for the account of each subscriber. These shares are interests in a semi-fixed investment trust of which the Trus-

tee is trustee and Independence issuer and depositor of the shares.

Thus, with respect to the contract certificates sold by Independence, Independence was depositor of the said trust shares as well as sponsor of the contract certificates, whereas, with respect to contract certificates sold by the other investment trust companies, Independence was depositor of the said trust shares and the particular investment trust company sponsor of the contract certificates.

27. Each Independence Trust Share represents a 1/1000th interest in a 'Deposit Unit' previously created by Independence with funds borrowed or supplied by it. The Deposit Unit consists of one share each of the common stock of forty-two corporations and cash accumulations to the proper proportion of a distribution of capital. The price at which Independence Trust Shares were and are sold to the Trustee for the account of the purchasers of contract certificates was and is not the actual creation cost of each share, but was and is computed upon the last sales price of each of the forty-two common stocks which constitute the Deposit Unit as of the day prior to the date of purchase by the Trustee, plus odd lot brokerage commissions and taxes. There was and is then added an arbitrary charge or load of 9 per cent. and any distributable accumulations then applicable to the Deposit Unit. This 9 per cent. arbitrary charge was and is divided 1½ per cent. to Independence and 7½ per cent. to the sponsor, and it was and is a source of income to the sponsor through the ten year term in addition to the $60 service charge which was and is deducted from the first nine payments. Independence Trust Shares were and are subject to an additional charge of 2½ per cent. of currently distributable income and currently distributable principal which charge is deducted semi-annually and paid to the Trustee."

The only testimony offered as to misrepresentations in the sale was testimony relating to misrepresentations made to seven persons none of whom were the complainants. (R. II, III, IV.) In light of the averments in the complainants Bill, and the testimony offered in proof thereof, it is apparent that such expressions as "fraudulent per se" and "all-pervasive fraud" are inaccurate as characterizing the nature of the business transacted by Independence Shares Corporation and its predecessor, Capital Savings Plan, Inc.

The complainants throughout their brief have stated that the defendant, Independence Shares Corporation, is insolvent. This is inaccurate and misleading.

The complainants' bill, Article VII, "Liability of Defendant Investment Company to Subscriber and Consequent Insolvency", in setting forth the facts on which they predicate the averment of insolvency, states (R. 23, 24):

> "43. The said liability of Independence to subscribers, but only with respect to Independence Trust Shares sold during the period from September 1, 1935, to June 14, 1938, has been admitted by Independence in a prospectus dated January 3, 1939, on pages 24 and 25, as follows:
>
> > 'A contingent liability exists with respect to 1,104,869 Independence Trust Shares sold by the Registrant for the period from September 1, 1935, to June 14, 1938. The actual amount of this contingent liability cannot be accurately determined without unreasonable effort and expense. However, the maximum amount of the contingent liability, as of August 31, 1938, is estimated to be $3,486,000 which amount represents approximately the amount actually received by the Registrant from the sale of such shares but which amount is estimated without adding interest at the rate of 6 per cent. per annum or deducting

distributions made to the holders of Trust Shares. Should the Registrant be required to repurchase Independence Trust Shares pursuant to its contingent liability, the Registrant would, as a result of such repurchase, acquire a beneficial interest in the common stocks underlying the Independence Trust Shares so repurchased. The contingent liability noted in this paragraph does not affect the common stocks underlying Independence Trust Shares.'

44. Plaintiffs have been informed, believe and therefore aver that the liability of Independence with respect to Independence Trust Shares sold prior to September 1, 1935, and after June 14, 1938, when added to the said admitted liability of $3,486,000. of Independence Trust Shares sold during the period of September 1, 1935 to June 14, 1938, exceeds exclusive of interest and/or profits, the said sum of $5,000,000.

45. The details of the fair valuation of the aggregate of the property and assets of Independence, its affiliates and subsidiaries, including the liquidation values of Independence Trust Shares and trust assets held by the Trustee are exclusively within the knowledge, control and possession of Independence, and until and unless the relief hereinafter prayed for is granted, your complainants and other subscribers will have neither knowledge nor means of knowledge of the said facts or any of them.

46. Plaintiffs are informed, believe and therefore aver that a fair valuation of the aggregate of the property and assets of Independence, its affiliates and subsidiaries, including the liquidation value of Independence Trust Shares and the trust assets held by the Trustee, is not sufficient in amount to pay the liabilities and debts of Independence and that Independence is therefore insolvent."

From the above it appears that the averment of insolvency of the defendant, Independence Shares Corporation, is based on a contingent liability, and we will point out later in this brief that contingent liability is not a basis for finding that insolvency exists. The balance sheet of Independence Shares Corporation of February 28, 1939 (R. 333-336) shows that the corporation is solvent. It is, therefore, improper for the complainants to state that Independence Shares Corporation is insolvent.

The complainants have also stated that the defendants have not denied flagrant fraud.

Independence Shares Corporation and the individual defendants in their answer have denied every averment of fraud (R. 55-61).

III. Jurisdictional Requirements.

(a) *Jurisdiction Does Not Exist Under Section 24 (1) (a) of the Judicial Code.*

Section 24 of the Judicial Code, as amended, R. S. Section 563, 629; March 3, 1875, c. 137, Section 1, 18 Stat. 470 as amended, 28 U. S. C. A. 41, states:

> "The district courts shall have original jurisdiction as follows: of all suits of a civil nature, at common law or in equity * * * where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000. and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority * * *."

The complainants claim that the District Court had jurisdiction under the foregoing provision.

The Circuit Court held that one of the requirements for jurisdiction under this provision was absent as the amount in controversy did not exceed the sum of $3,000.00. The Court, discussing this question, stated (R. 382):

"Nor does the amount in controversy exceed the sum of $3,000. Section 24 (1) of the Judicial Code as amended, 28 U. S. C. A. 41 (1). The claims of the appellees may not be aggregated and the claim of no one appellee amounts to more than $2,000. Moore's Federal Practice, Vol. 2, Section 23.08; Pinel v. Pinel, 240 U. S. 594; Lion Bonding & Surety Co. v. Karatz, 262 U. S. 77."

The complainants contend that the amount in controversy is to be measured by the assets sought to be reached rather than the amount of the claims of the complainants. This position is unsound because this Court has decided the question to the contrary. In *Lion Bonding & Surety Co. v. A. H. Karatz*, 262 U. S. 77, 67 L. Ed. 871, considering the jurisdictional questions arising in a petition for the appointment of a receiver, Mr. Justice Brandeis, at pages 85, 86, stated:

> "The facts specifically stated show that the amount in controversy was less than $3,000.00. Plaintiff's claim against the company was $2,100.00. He prayed that this debt be declared a first lien on the assets within the state. His only interest was to have that debt paid. The amount of the corporation's assets, either within or without the state, is of no legal significance in this connection, nor is the amount of its debts to others."

To the same effect, see *Robbins v. Western Automobile Insurance Company* (Circuit Court of Appeals, 7 Circuit, 1924), 4 Fed. (2d) 249.

In the instant case, the original complainants are potential creditors whose claims in the aggregate are less than $3,000.00 (R. 274-276), and under the authorities above cited, the amount of the defendant's assets is immaterial, therefore jurisdiction does not exist under 41 (a) of the Judicial Code.

The complainants, whose bill was filed on March 11, 1939, not having the requisite jurisdictional amount, sought to cure the defect by the addition of two parties on May 25, 1939 each of whom had paid in excess of $3,000.00 on contract certificates (R. 311, 366). Exceptions to this amendment were filed on behalf of the defendants (R. 367).

Where jurisdictional amount is lacking at the time a suit is instituted, it cannot be supplied by adding additional complainants. *Cochrane v. W. F. Potts Son & Co.* (C. C. A. 5th, 1931) 47 F (2) 1027; *Moore's Federal Practice,* Vol. 2, R. 24, § 24.15, pp. 2415, 2416.

The same contention was made before the Circuit Court of Appeals and it properly decided that the amount in controversy did not exceed $3,000. (R. 382.)

(b) *There is no Jurisdiction in Equity Under Section 24 (8).*

The complainants state that the Securities Act is a law regulating commerce and that, therefore, the District Court had jurisdiction to appoint a receiver for Independence Shares Corporation under Section 24 (8) of the Judicial Code which reads as follows:

> "The District Courts shall have original jurisdiction as follows; * * * of all suits and proceedings arising under any law regulating commerce."

This does not, as in Section 1 (a) provide for suits in law and in equity.

The Securities Act gives the right to sue at law or in equity for the purpose of recovering the consideration paid under the conditions provided for in the Act. The right to sue in equity is not an absolute right and is limited by the provisions of the Judicial Code as set forth in Section 267 which provides:

"Suits in equity shall not be sustained in any Court of the United States where a plain, adequate and complete remedy may be had at law."

The Circuit Court in its opinion states that the District Court had jurisdiction under this section to grant the relief in the Securities Act, viz: the right to recover the consideration paid, and only this right.

The consideration paid by the complainants was money (R. 274, 275) so that a money judgment recoverable at law is the only relief they are entitled to under the Securities Act. The limitation of Section 267 of the Judicial Code applies, and since the complainants have an adequate remedy at law, they have no right to equitable relief.

Even if the allegation that misrepresentations were made to the complainants in the sale of securities to them be considered as true for the purpose of this argument, they would not be entitled to sue in equity. They have an adequate remedy at law, and as was stated by this Court, "equity does not now take jurisdiction in cases of fraud where the relief properly obtainable on that ground can be obtained in a court of law". *Equitable Life Assurance Society v. Brown,* 213 U. S. 25, 50; 53 L. Ed. 682, 693; 29 S. Ct. 402.

The reasons alleged by the complainants for equitable relief and the appointment of a receiver as set forth in their brief on page 26 are as follows:

"(a) Independence Shares Corporation is insolvent and unable to meet its liabilities.

(b) A proper accounting can be undertaken only by a receiver appointed by the Court and not by agents and accountants dominated by the defendants.

(c) The appointment of a receiver will prevent the threatened and probable multiplicity of suits.

(d) The appointment of a receiver will prevent further dissipation, depletion and waste of assets

equitably belonging to planholders and will preserve and safeguard the said assets.

(e) The appointment of a receiver will prevent inequitable preferences and will result in the division of all assets equitably among the persons entitled thereto without the necessity of further litigation.

(f) The litigation and equitable distribution of the assets belonging to planholders should be undertaken only by an officer or representative of the court."

It will be demonstrated that none of these alleged reasons entitle the complainants to sue in equity to recover their consideration by means of a receivership.

As to (a), not only do we establish in another portion of the brief that the corporation is solvent, but we show that potential creditors such as the complainants have no right to the appointment of a receiver even though we were to admit the defendant, Independence Shares Corporation, to be insolvent.

As to (b), the only claim that the complainants have is to recover the consideration paid by them, and any information necessary to establish the amount of that claim is within their knowledge and no accounting of the corporation's affairs generally is necessary. "A mere creditor as such has no right to that remedy." *Equitable Life Assurance Society v. Brown,* supra at page 44 (L. Ed. 690).

As to (c), a complainant may not urge, as a ground for jurisdiction in equity, that the defendant will thereby be saved a multiplicity of suits by other persons where the defendant raises no objection to such possible suits and urges no such ground for equitable jurisdiction. *Equitable Life Assurance Society v. Brown,* supra at page 51 (L. Ed. 693).

As to (d), the property belonging to the planholders is held by the Pennsylvania Company as trustee subject only to the order of the individual planholders. The assets

of the defendant, Independence Shares Corporation, are not the property of the individual planholders. Even if the corporation were insolvent, the complainants as potential creditors have no right to seek a receiver or to restrain the defendant in the use of its assets.

As to (e), the only right the complainants have is the right to the return of the consideration paid by them. This right is in no wise prejudiced if they receive a preference as they allege.

As to (f), as we have already pointed out, they have no right to the appointment of a receiver, and therefore, the liquidation and equitable distribution of the defendants' assets will not occur.

IV. Securities Act of 1933 Does Not Give a Defrauded Purchaser Any Right to Ask for a Receiver, But Gives Him Merely the Right to Ask for a Money Judgment Under the Conditions Set Forth in the Act.

The complainants contend that Sections 22 (a) and 12 (2) of the Securities Act of 1933 gave the District Court the power to appoint a receiver for the defendants.

Section 22 (a) of the Securities Act of 1933 reads:

> "The district courts of the United States, the United States courts of any Territory, and the District Court of the United States of the District of Columbia shall have jurisdiction of offenses and violations under this title and under the rules and regulations promulgated by the Commission in respect thereto, and concurrent with State and Territorial courts, of all suits in equity and actions at law brought to enforce **any liability or duty created by this title** . . ." (Emphasis ours.)

The complainants contend that since Section 22 (a) of the Securities Act gives the District Court jurisdiction in law and equity, the Court, by reason of this grant of juris-

diction, had the right to appoint a receiver. What the complainants have failed to take into consideration is the qualifying provision which accompanies the grant of jurisdiction, and restricts the jurisdiction to actions "**to enforce any liability or duty created by this title.**"

It is necessary, therefore, to examine the Act to see what liabilities or duties are created thereby.

Sections 11 and 12 of the Act deal with the civil rights given to individual purchasers. Section 11 considers liabilities on account of false registration statement, of which there is no averment in this case. Section 12 deals with the civil liability arising in connection with prospectuses and communications, and this section alone must determine what rights or duties are given or imposed in Section 22 of the Act cited above.

Section 12 provides:

"Any person who—

(1) sells a security in violation of section 5, or

(2) sells a security (whether or not exempted by the provisions of section 3, other than paragraph (2) of subsection (a) thereof), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission, shall be liable to the person purchasing such security from him, **who may sue either at law or in equity** in any court of competent jurisdiction, **to recover the consideration paid for such security** with interest thereon, less the amount

of any income received thereon upon the tender of such security, or for damages if he no longer owns the security." (Emphasis ours.)

Although this section states that a suit may be brought at law or equity, such a suit may be brought only for the purpose of recovering the consideration paid. In other words, the right given, and the only right given under the Securities Act, is the right to recover the consideration paid upon proof of certain facts as provided therein. No right to petition for a receiver is given. The complainants are in error when they assume that because the Act gives the right to sue in law or equity in the State and Federal Courts to recover the consideration paid, that, therefore, by inference they are given the right to the appointment of a receiver. The Circuit Court of Appeals thus properly held (R. 383):

> "Section 12 (2) of the Securities Act therefore provides a right to sue in a District Court of the United States for one who has purchased securities upon an untrue statement of a material fact made by the use of any means of transportation or communication in interstate commerce and that such a suit may be maintained by the aggrieved person in an action at law or by a bill in equity depending upon whether the cause of action is cognizable at law or in equity. At the present time, the remedy of the aggrieved person lies in the 'civil action' prescribed by Rule 2 of the Federal Rules of Civil Procedure. The nature of the suit, however, remains as specified by Section 12 (2). The defrauded person must seek to recover 'the consideration' paid by him. The relief given by the section is for a money judgment or for a money decree payable to the individual who has been defrauded."

An examination of a number of articles dealing with the question of the civil liability of a seller of securities discloses that the writers are of the opinion that the only

rights that purchasers of securities have are rights set forth in Sections 11 and 12 of the Act, and that they are there given only a right to recover the consideration paid. *Securities Act of 1933; L. K. James,* Prof. of Law, University of Michigan Law School, 32 Mich. Review, 624; *Administrative Interpretation of the Securities Act of 1933,* 45 Yale Law Journal 1076; *Prentice-Hall, Securities Regulation Service,* Vol. 1, Service Par. 3151.

In 43 Yale Law Journal 227, 243 Harry Shulman, Associate Professor of Law, Yale University, in an article entitled "Civil Liability and the Securities Act", speaking of the civil liability imposed by Sections 11 and 12 of the Act, states: "Neither part of the section puts the seller under a novel, indeterminate or harsh risk."

"There is nothing, however, which affects a corporation with such serious consequences as does the appointment of a receiver; it is a severe, and may be termed an heroic remedy." *MacDougall v. Hunt et al,* 294 Pa. 108, 117.

It is submitted that the appointment of a receiver at the request of persons claiming under Section 12 (2) of the Securities Act would indeed place upon a seller of securities a "harsh risk."

The complainants further contend that jurisdiction to grant the appointment of a receiver exists under Section 16 of the Securities Act which reads:

> "The rights and remedies provided by this subchapter shall be in addition to any and all other rights and remedies that may exist at law or in equity." (15 U. S. C. A. Sec. 77p.)

The only effect of this section is to preserve to injured persons their remedies at common law or by state statutes. *Prentice-Hall Securities Regulation Service,* Service Par. 3148.

The Circuit Court of Appeals, considering the effect of Section 16, stated (R. 383):

"Section 16 of the Act, 48 Stat. 84, (15 U. S. C. A. 77p.) providing that 'The rights and remedies provided by this title shall be in addition to any and all other rights and remedies that may exist at law or in equity', does not relate to venue as indicated by the court below or enlarge the remedy given by Section 12 (2). Congress by the language employed sought only to make it abundantly clear that it was not preempting this field to the federal jurisdiction, thereby prohibiting recovery to defrauded individuals under the law of the states as that existed prior to the passage of the Securities Act."

Since the Securities Act of 1933 does not provide for the relief sought by the complainants, the orders of the District Court were properly reversed.

V. The Securities Act of 1933 Does Not Give Complainants Thereunder the Right to Bring a Collective Suit.

The complainants have brought what they term a class bill and argue that the right to bring a class bill entitles them to the appointment of a receiver. It is submitted that the Securities Act of 1933 gives them no right to bring a class bill. The Act gives to each individual a separate right to sue for the consideration paid. Prof. Shulman in "Civil Liability and the Securities Act", supra, states that the Act gives to the purchaser a right to recover a money judgment and that this right is an individual right to be enforced by him individually. On page 251 the author says: "It is to be remembered that **no representative action is provided nor is any agency established for the bringing of a collective suit. Each investor must sue separately.**" (Emphasis ours.)

The Circuit Court of Appeals in its opinion recognizes that the Securities Act does not give claimants the right to bring a class action, but it holds that a spurious class suit may be maintained under Rule 23 (a) (3) of the Federal Rules of Civil Procedure.

The instant suit is not a class suit. It is a spurious class suit which is merely a procedural device extending the field of permissive joinder. It does not give the complainants any greater right to the appointment of a receiver than they would have had if they had brought individual suits. *Moore's Federal Practice*, Vol. 2, Sec. 23.04—(3), page 2241.

VI. Complainants Are Potential Simple Contract Creditors of the Defendant, and Have No Right to Sue for the Appointment of a Receiver Until They Have Established Their Claims and Reduced Them to Judgment.

The complainants are holders of contract certificates sold to them by Capital Savings Plan, Inc. (R. 5, 6). They aver that there were material misrepresentations made to them in the sale of the contract certificates (R. 13-22), and therefore, the defendant, Independence Shares Corporation, is liable to them under Section 12 (2) of the Securities Act of 1933. (R. 22-24.)

None of the complainants appeared and testified, nor was there any testimony as to any fraud in connection with the sale of the contract certificates to any of the complainants. (R. II, III, IV.)

In determining whether complainants are entitled to the appointment of a receiver it is necessary to determine the relationship between the complainants and the defendant, Independence Shares Corporation.

Capital Savings Plan, Inc. predecessor of Independence Shares Corporation, sold and complainants purchased Capital Savings Plan Contract Certificates (R. 5, 6). The contract between Capital Savings Plan, Inc. and the complainants provided for the issuance to the complainants of contract certificates. Under the terms of the contract certificates, Capital Savings Plan, Inc., contracted that the Pennsylvania Company would act as Trustee for the holders of contract certificates and, as such Trustee, the Pennsylvania Company would receive payments made by the

contract certificate holder, and after authorized deductions, purchase trust shares which would be held by the Pennsylvania Company for the contract certificate holder individually. (Original Exhibit No. 5, offered at R. 270; Original Exhibit No. 1 now lodged with this Court, printed Pa. Co. Appendix, pp. 31, 39.)

Capital Savings Plan, Inc. entered into a contract with the Pennsylvania Company, whereby the Pennsylvania Company contracted to act as Trustee for holders of the contract certificates, to receive payments made by such contract certificate holders and after making authorized deductions invest the balance in Independence Trust Shares, and to hold the trust shares as individual trust property for each contract certificate holder, subject to his order only. (Original Exhibit No. 1, now lodged with this Court, printed Pa. Co. Appendix, pp. 4, 5, 6.)

The complainants based their cause of action upon alleged misrepresentations on the part of Capital Savings Plan, Inc. in the sale to them of their Capital Savings Plan Contract Certificates. These contract certificates as shown above are contracts between the holder and Capital Savings Plan, Inc. Any claim made by the holder in connection therewith is a claim made in connection with the contract of sale.

The Securities Act of 1933, Section 12 (2) gives the purchaser a right to recover for misrepresentations in the sale of a security. The right is, as it was at common law, a right to recover the consideration paid.

The status of the complainants' alleged right to recover under the Securities Act must be determined by Section 12 (2) of the Act under which their alleged claim would arise. The only right Section 12 (2) gives is "a right to recover the consideration paid for such security . . . upon the tender of such security, or for damages if he no longer owns the security." The complainants are, therefore, potential simple contract creditors.

Before any of the complainants is entitled to the status of a creditor of Independence Shares Corporation, it is necessary for him to establish under Section 12 (2) of the Securities Act that he purchased the securities from the seller who sold them to him "by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care would not have known, of such untruth or omission."

It is also necessary for each of the complainants to show that his cause of action is not outlawed by the statute of limitations appearing in Section 13 of the Act. The Act has two limitation periods, the shorter for one year and the longer for three years.

Attention is called to the fact that three of the complainants purchased their contract certificates in 1934, one in 1935, two in 1936, two in 1937 and one in 1938, and of the two parties sought to be added as additional complainants, one purchased his contract certificate February 21, 1936, and the other purchased two contract certificates, one October 19, 1932 and one July 16, 1935. (R. 5, 6.)

The complainants' right of action is indeed tenuous and falls far short of the right of a simple contract creditor. At best, their claims are those of potential simple contract creditors.

The law is well settled that a simple contract creditor, and fortiori, a potential simple contract creditor, cannot evoke the aid of a court of equity until he has exercised his remedies at law, first of which is a recovery of a judgment at law and return of execution unsatisfied.

In *Pusey and Jones Company v. Hanssen,* 261 U. S. 491, 495, 67 L. Ed. 763, 1933, this Court considered an action brought by a holder of promissory notes on behalf of him-

self and all other creditors. The Court stated the question involved:—

> "Whether the Federal court, sitting in equity, has, by reason of the above statute, jurisdiction to appoint a receiver of an insolvent Delaware corporation upon application of an unsecured simple contract creditor, is the main question presented."

Mr. Justice Brandeis, delivering the opinion of the Court, stated the law to be as follows (p. 497):

> "A receiver is often appointed upon application of a judgment creditor who has exhausted his legal remedy. See *White v. Ewing*, 159 U. S. 36. But an unsecured simple contract creditor has, in the absence of statute, no substantive right, legal or equitable, in or to the property of his debtor. This is true, whatever the nature of the property, and although the debtor is a corporation and insolvent. The only substantive right of a simple contract creditor is to have his debt paid in due course. His adjective right is, ordinarily, at law. He has no right whatsoever in equity until he has exhausted his legal remedy. After execution upon a judgment recovered at law has been returned unsatisfied, he may proceed in equity by a creditors' bill."

Mr. Justice Brandeis then distinguished cases in which a petition for the appointment of a receiver by an unsecured creditor had been allowed where the defendant did not object and joined in the prayer. These cases are not authority for the appointment of a receiver where the defendant objects. In such cases, upon objection, a petition for the appointment of a receiver will be dismissed.

This case was cited and approved in *Gordon v. Washington*, 295 U. S. 30, 79 L. Ed. 1282 (1934).

This court, in *Hollins v. Brierfield Coal & Iron Co.*, 150 U. S. 371, 14 Sup. Ct. 127, 37 L. Ed. 1113, held that a simple contract creditor of a corporation whose claim has not been

reduced to judgment, and who has no express lien upon its property, has no standing in a federal court of equity to obtain the seizure of the debtor's property through a receiver and its application to the payment of such debt. In this case, at page 379, the Court says:—

> "It is the settled law of this court that such creditors cannot come into a court of equity to obtain a seizure of the property of their debtor, and its application to the satisfaction of their claims; and this notwithstanding a statute of the state may authorize such a proceeding in the courts of the state. The line of demarcation between equitable and legal remedies in the federal court cannot be obliterated by state legislation."

In discussing this point, the Circuit Court of Appeals, in the course of its opinion (R. 479), stated:—

> "Nor does Section 12 (a) enlarge the right of the appellees to the appointment of a receiver for the corporation upon the ground that it is insolvent or its assets are being dissipated. The law in this respect remains as it was. See Pusey & Jones Co. v. Hanssen, 261 U. S. 491, 497, and the authorities there cited. It follows that none of the prayers of the bill of complaint asking for specific relief may be granted."

The complainants have not contended that the principles laid down in Pusey & Jones Co., supra, and Hollins v. Brierfield, supra, are not the law, but they endeavor to establish their right to ask for a receiver on the authority of the following cases which they have cited in their brief. *Wyman v. Wallace,* 201 U. S. 230, 50 L. Ed. 738, (1905); *Merchants National Bank et al. v. Chattanooga Construction Co.,* 53 F. 314; *Cook v. Flagg,* 233 F. 426.

All these cases are clearly distinguishable from the case at Bar.

The case of *Wyman v. Wallace,* supra, involved the right of a creditor to bring a bill in equity to enforce a stockholder's double liability under the National Banking Laws and the Court held that Section 2 of the Act of June 30, 1876 providing that liability may be enforced "by any creditor of such association by bill in equity in the nature of a creditor's bill" was applicable and controlling.

In *Merchants National Bank et al. v. Chattanooga Construction Co.,* supra, the bill alleged that the defendant's assets were being diverted and appropriated in fraud of its creditors, and in the opinion of the Court, it is stated: "It charges violation of trust, the distribution and concealment of assets. It charges conspiracy, confederation and fraud for the purpose of despoiling defendant of its assets and leaving its creditors without redress, and all this is done, it is alleged, by its officers and stockholders and these allegations are not denied."

It is apparent that it is no authority for the right of these complainants to seek the appointment of a receiver for Independence Shares Corporation. The complainants in the case at Bar are not even creditors. They have established no claims. All allegations of fraud in the case at Bar have been vigorously denied. There is no allegation in the case at Bar by the complainants that the defendant, Independence Shares Corporation, is being stripped of its assets and property and the record discloses no evidence of it. Furthermore, as hereafter pointed out, Independence Shares Corporation is solvent.

In *Cook v. Flagg,* supra, the Court appointed a receiver for a fund of $200,000. which was in the hands of Flagg. He was not a member of the stock exchange. He had devised a fraudulent scheme for speculating in stocks and had been convicted of using the mails to defraud in similar transactions. There had been entrusted to him $1,100,000. of which Cook, the complainant, had put up $10,200. Flagg was financially irresponsible and had only $200,000. to meet an admited liability of $1,100,000. Evidence was introduced

showing that Flagg had stated in a letter to the Assistant Attorney General that every dollar of the securities and cash deposited with him belonged to his customers and that he was handling the case and assets of his customers as a fiduciary.

The facts appearing in the Flagg case are totally dissimilar to the facts in the present case. There it appears that Flagg had stated that the fund in question was held by him in trust for the persons who had entrusted him with the funds for investment, among whom was the complainant. The complainants in this case have established no right to recover anything against Independence Shares Corporation.

In addition the person against whom the receivership proceedings were taken was a proved criminal and his criminality existed in connection with a similar fraudulent scheme. The assets themselves were the subject of a trust. In the case at Bar, as has been previously pointed out, no trust relationship exists between the complainants and Independence Shares Corporation. There are no authorities cited in the Flagg case and it is apparent that it is authority only on its own peculiar facts.

VII. Contingent Liability Is Not an Actual Liability and Does Not Establish Insolvency.

The only allegation of insolvency in the complainants' brief is based upon a contingent liability footnote to the balance sheet of Independence Shares Corporation as of August 31, 1938, appearing in the prospectus of Independence Trust Shares of January 3, 1939. (R. 22-24.)

This footnote is a "bring down" of the contingent liability footnote which appeared for the first time on the balance sheet of Independence Shares Corporation as of February 28, 1938, as contained in the prospectus of Independence Trust Shares Purchase Plans of June 8, 1938, page 24, and in the prospectus of June 14, 1938, of Independence Trust Shares under a heading "contingent lia-

bility" on page 39. (Original Exhibit No. 15 now lodged with this Court, pp. 24, 39.)

The footnote is as follows:

"A contingent liability may also exist with respect to 986,906 Independence Trust Shares sold by the Registrant during the period from March 1, 1935, to February 28, 1938. The great majority of these Shares were sold to the Trustee for the holders of Capital Savings Plan Contract Certificates, a few were sold to the sponsors of Plans similar to Capital Savings Plan Contract Certificates and a few were sold to brokers. At the time the Capital Savings Plan Contract Certificates were originally issued during this period, it was believed that all of the holders were residents of Pennsylvania, but a few either later moved out of the Commonwealth of Pennsylvania, or created Trusts for beneficiaries residing outside of Pennsylvania, or assigned their Contract Certificates to persons residing outside of Pennsylvania. Both the Registrant and its counsel were of the opinion that it was unnecessary to register under the Securities Act of 1933, as amended, any of the Independence Trust Shares so sold. However, the Registrant has now been advised that by reason of the possible interstate nature of certain of the sales, it may be that all of the Independence Trust Shares so sold should have been registered under the Securities Act of 1933, as amended, and that, therefore, the Registrant may have created a contingent liability for rescission or for damages under Section 12 (1) of the Securities Act of 1933, as amended, with respect to such shares. The actual amount of this possible contingent liability cannot be accurately determined without unreasonable effort and expense. However, the maximum amount of the contingent liability, as at February 28, 1938, is estimated to be $3,222,000. which amount represents approximately the amount actually received by the

Registrant from the sale of such Shares, but which amount is estimated without adding interest at the rate of 6 per cent per annum or deducting distributions made to the holders of Trust Shares. In addition to the contingent liability as at February 28, 1938, there also may be a contingent liability in an indeterminate amount for Independence Trust Shares sold subsequent to said date. Should the Registrant be required to repurchase Independence Trust Shares under Section 12 (1) of the Securities Act of 1933, as amended, the Registrant would, as a result of such repurchase, acquire a beneficial interest in the common stocks underlying the Independence Trust Shares so repurchased. The contingent liability noted in this paragraph does not affect the common stocks underlying Independence Trust Shares." (Original Exhibit No. 15 now lodged with this Court, p. 24.)

This contingent liability has been stated as $3,222,000. in the footnote of the balance sheet of June 8, 1938, and $3,486,000. in the footnote of the balance sheet of August 31, 1938 (R. 23). The difference in the amounts is due to the fact that the two statements cover different periods of time and more shares were sold in one period than in the other.

There is no question as to the solvency of Independence Shares Corporation on the basis of its balance sheet (R. 333-336).

A contingent liability cannot establish the insolvency of a business because by definition of the term contingent it is not a liability.

In the case of *Equitable Life Assurance Society v. Brown, supra,* at page 692, a petition for the appointment of a receiver was filed alleging insolvency of the defendant. The basis of insolvency was predicated upon contingent liability arising from claims that might be made

against the defendant insurance company by the complainant and other policy holders. The Court in disposing of this question at page 692, states:

> "The subsequent averment that the defendant is insolvent, because, as a conclusion of law asserted by the pleader, it is responsible to policy holders for excessive sums paid in the way of salaries and fees, and also for sums of money lost consequent upon the fraud and waste of the directors or officers of the defendant, all of which are too large for the defendant to pay when demanded, is not admitted by the demurrer, and is not accurate as a conclusion of law. Whether such liability could be legally maintained or whether the defendant would be unable to pay the amount claimed from it when it was properly proved, and judgment duly recovered against it in an action for that purpose, is a mixture of a legal conclusion with a matter of opinion as to the future ability of the defendant to pay such liabilities. And the idea that the defendant itself is liable to policy holders for the frauds or wrongdoing set out in the bill and committed by its officers or members of its board of directors against the defendant, and in their personal interests, we regard as without foundation. Such a kind of future possible insolvency furnishes not the slightest ground for present legal action adverse to the defendant."

In the instant case the allegation of insolvency is predicated entirely upon the fact that the defendant, Independence Shares Corporation, under Section 12 (1) of the Securities Act may become liable to planholders by reason of the sale of securities without an effective registration statement. Since contingent liability is not a real liability for the purpose of determining solvency or insolvency, and since the balance sheet of Independence Shares Corporation shows that it is solvent, there is no equitable jurisdiction based upon insolvency.

In re *Nassau* (District Court, Eastern District of Pennsylvania 1905), 140 Fed. Reporter 912, Referee Hunter, whose conclusions were adopted by District Judge MacPherson, in speaking of the effect of a contingent liability states: "A contingent debt may doubtless be proven against an asset and the same retained by the trustee to meet the contingency. **It does not follow, however, that this contingent debt is to be forced as a present liability and cause the debtor's liabilities to outweigh his assets. The bankrupt appears entitled to the benefit of the doubt whether this contingent liability will mature into an actual one.**" (Emphasis ours.)

It further appears that under the Bankruptcy Act of 1898 contingent liabilities are not provable as claims in bankruptcy. *In Re: Inman & Co.*, 171 Fed. Reporter 185.

The contingent liability footnote appearing on page 24 of the prospectus of June 8, 1938, quoted above discloses that it was placed there because of possible claims that might arise under Section 12 (1) of the Securities Act. The basis of the possible liability is the sale of Independence Trust Shares without having an effective registration statement with the Securities and Exchange Commission.

The registration statement of Independence Trust Shares became effective with the Securities and Exchange Commission as of June 14, 1938, and under Section 13 of the Securities Act of 1933 no action can be brought to enforce a liability under Section 12 (1) unless brought within one year after the violation upon which it is based. In the instant case no action could be brought after June 14, 1939. (Original Exhibit No. 15 lodged with this Court, p. 27.) (R. 61.)

On June 15, 1939, contingent liability terminated and there is no averment in the bill and no testimony produced that any suits were instituted under Section 12 (1) prior to June 15, 1939. The only allegation of insolvency having been based on contingent liability and the evidence disclosing that Independence Shares Corporation is solvent, one

of the assigned allegations of the complainants' cause of action, viz: insolvency of Independence Shares Corporation, is untrue.

VIII. The Order of the Court Granting a Preliminary Injunction Enjoining the Payment of $38,258.85 Was Improper.

In March of 1939 the Pennsylvania Company at the request of Independence Shares Corporation, in accordance with the terms of the trust agreement, sold seven of the forty-two securities underlying Independence Trust Shares (R. 83, 85-90). The District Court found that the sale of the seven securities was proper (R. 361). A large portion of the proceeds received by the Pennsylvania Company from the sale of these seven securities was reinvested by the Pennsylvania Company for planholders in Independence Trust Shares in accordance with authorization of planholders (R. 281-283). The District Court enjoined the Pennsylvania Company from paying, and Independence Shares Corporation from receiving, the sum of $38,258.85 due from the Pennsylvania Company to Independence Shares Corporation for creating Independence Trust Shares (R. 368).

There was no justification for this injunction by the District Court, and the Circuit Court of Appeals properly reversed the District Court's order since it found that the District Court had no authority to appoint a receiver and that the granting of an injunction as incidental to the appointment of a receiver was improper.

CONCLUSION.

The complainants' substantive rights stem from the Securities Act, and this Act gives them a money judgment upon proof by them of a cause of action under the Act. This would be an action at law. Thus, complainants have no standing in a court of equity since they have an adequate remedy at law.

Even if it is assumed that misrepresentations were made to the complainants in the sale of securities to them, and that Independence Shares Corporation is insolvent, still complainants are not entitled to the appointment of a receiver as they are potential simple contract creditors.

Independence Shares Corporation is solvent and the position of the complainants that contingent liability establishes insolvency is unsound. Further, it appears that the contingent liability has ceased to exist upon which complainants ground the assumption that Independence Shares Corporation is insolvent.

Independence Shares Corporation filed an answer denying misrepresentations in the sale of securities to the complainants. It stated and proved that it is solvent.

Common sense as well as established law requires that the opinion of the Circuit Court be affirmed.

Respectfully submitted,

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